

No. 87-1354

Supreme Court, D.C.

FILED

MAR 25 1988

JOSEPH E. GRANOL, JR.

CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1987

CBS INC., a New York Corporation,
and WALTER JACOBSON,
Petitioners,

v.

BROWN & WILLIAMSON TOBACCO CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

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INTRODUCTION

Respondent Brown & Williamson Tobacco Corp. ("B&W") argues essentially four reasons why a Writ of Certiorari should be denied in this case:

(1) because the constitutionality of presumed and punitive damages in public figure/public issue libel cases has already been decided (Br. in Opp. 11, 18);¹

(2) because the damages described by the Court of Appeals as presumed damages "not required to be proved by evidence" (App. 41a), were actually compensatory damages based on "direct proof" of "grave" and "massive" injury to B&W (Br. in Opp. 11, 17);

(3) because the punitive damage award upheld by the Court of Appeals solely on the basis of actual malice

¹ The following abbrevitaions are used in this brief. Respondent's Br. in Opposition, ("Br. in Opp."); Appendix to Petition, ("App."); Petition for Certiorari ("Pet.").

(App. 47a) was actually based on “findings of *both* actual and express malice” (Br. in Opp. 11, emphasis in original); and

(4) because the misconduct of petitioners was so “gross,” “egregious,” “outrageous” and “irresponsible” that the Court should not review the case. (Br. in Opp. 12, *passim*).

The basic question raised by the petition is whether, under any circumstances, presumed and punitive damages in public figure/public issue libel cases can be reconciled with the heightened protection required by the First Amendment. Therefore, any case that squarely presents the issue will necessarily involve findings and allegations of actual malice. Otherwise, under *Gertz*,² there would be no award of presumed and punitive damages to review. Thus, even if B&W’s version of the facts were true (which, emphatically, it is not), this would not be a reason to deny certiorari. It would merely reinforce the conclusion that this case presents all elements necessary for the Court to finally resolve this important constitutional issue.³

REPLY TO RESPONDENTS’ ARGUMENTS

I. THE CONSTITUTIONALITY OF PRESUMED AND PUNITIVE DAMAGES IN PUBLIC FIGURE/PUBLIC ISSUE LIBEL CASES HAS NOT BEEN DECIDED BY THIS COURT

The petition, at pages 9-10 and 15, sets out the manner in which this issue was left open by the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), both cases involving *private* figures. B&W’s Brief in Opposition does not attempt to answer

² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

³ It might even be argued that the kind of egregious conduct described by B&W would bring the issue into sharper focus, providing even more reason to grant review.

these points, but blindly cites the plurality opinions in *Dun & Bradstreet* and *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), for the proposition that the Court has already “squarely rejected” petitioners’ arguments. (Br. in Opp. 11.)

B&W’s choice of these two authorities is particularly inappropriate. The opinion in *Dun & Bradstreet* carefully distinguished the purely *private* speech at issue in that case from “speech on matters of *public* concern” and “libel actions brought by *public* persons.” 472 U.S. at 756, 758 (discussed at Pet. 10-11). In addition, five of the Justices in that case expressed reservations about the role of presumed and punitive damages in such libel actions. See 472 U.S. at 771 (White, J., concurring in the judgment), 793-94 (Brennan, J., dissenting) (discussed at Pet. 10 n.10).

The pre-*Gertz* opinion in *Curtis Publishing* on which B&W relies was authored by Justice Harlan, who later expressly retreated from the reasoning of that opinion on the very point for which it is cited by B&W—the constitutionality of punitive damages.⁴

B&W also argues that there is no controversy among the circuit courts because “[e]very Court of Appeals to pass on the question has interpreted *Gertz* to mean that, when actual malice is shown, the normal damage rules of libel law apply without restriction.” (Br. in Opp. 11, 19.) But this result-oriented survey ignores the fact that the majority of opinions cited by B&W express uncertainty on the issue. For example, in *Buckley v. Littell*, 539 F.2d 882 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977), the court expressly recognized:

It may be that *Gertz v. Robert Welch, Inc.*, [*supra*], and its underlying concern . . . will ultimately lead the Supreme Court to hold that punitive damages cannot constitutionally be awarded to a public figure,

⁴ See *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 72 n.3 (1971) (Harlan, J., dissenting) (quoted at Pet. 10 n.11).

but the court felt compelled by its own prior decisions to permit punitive damages "absent clear word from the Court to the contrary." *Id.* at 897. Similarly, in *Maheu v. Hughes Tool Co.*, 569 F.2d 459 (9th Cir. 1977) the Ninth Circuit recognized that the Supreme Court "has left open the question of whether [punitive damages] can be awarded in situations in which the high and protective standard of actual malice has been met." *Id.* at 478. *Davis v. Schuchat*, 510 F.2d 731, 737 (D.C. Cir. 1975), and *Carson v. Allied News Co.*, 529 F.2d 206, 214 (7th Cir. 1976), also cited by B&W, found only that support for such awards might be implied from language in *Gertz*.

The possibility that constitutionally-suspect presumed and punitive damage awards are being upheld by lower courts on the basis of nothing more than the *silence* of this Court on the question is a far more compelling reason to grant review than any technical conflict among the circuits. Whatever the ultimate outcome of the Court's review might be, the First and Fourteenth Amendments mandate more precise guidance on this issue.

II. THE AWARD OF PRESUMED DAMAGES WAS NOT BASED ON DIRECT EVIDENCE OF ACTUAL INJURY

B&W argues that the presumed damage issue is not really before this Court because B&W proved "grave" and "massive" injury to its reputation with *direct* evidence. (Br. in Opp. 11, 15-17.) The argument conveniently ignores the fact that at trial B&W chose to hide behind second- and third-hand hearsay on the issue of damage to its reputation, thus preventing cross-examination on the question. The real effect, if any, the broadcast might have had and the real cause of the alleged damage, if any, were safely insulated from view.⁵ The Dis-

⁵ One of the practical criticisms levelled at presumed damages is the fact that it eliminates causation as an issue. See Anderson,

strict Court properly rejected the "evidence" as hearsay (App. 117a), and the Court of Appeals did not disturb this ruling. Instead, the Seventh Circuit simply exercised its own discretion to award \$1,000,000, recognizing that "this is a very inexact and somewhat arbitrary process . . . inherent in the doctrine of presumed damages." (App. 47a; *see also* 41a & n.11.) The extensive quotations from both Seventh Circuit decisions at pages 16 and 17 of B&W's Brief are not a recognition that damages were established by direct proof, as B&W asserts. They are nothing more than the circuit court's own rationalization for finding libel *per se* and awarding presumed damages.

The issue is not, as B&W argues, whether it should be required to prove pecuniary damages as opposed to reputational injury (*see* Br. in Opp. 11), although that may well be a legitimate question in the case of a corporation. *See Dun & Bradstreet*, 472 U.S. at 793 n.16 (Brennan, J., dissenting). The issue is whether B&W is entitled to \$1,000,000 without satisfying the requirement of *Gertz* that "all awards must be supported by competent evidence concerning the injury." 418 U.S. at 350. The Court of Appeals' decision to award this amount as presumed damages "not required to be proved by evidence" (App. 41a) places the issue squarely before this Court.

III. THE PUNITIVE DAMAGE AWARD WAS NOT BASED ON A SEPARATE FINDING OF EXPRESS MALICE

B&W argues that the punitive damage issue also is not really before the Court because the award was based on "findings of *both* actual and express malice." Br. in Opp.

Reputation, Compensation and Proof, 25 Wm. & Mary L. Rev. 747, 764 (1984). Without examination of direct evidence there is no way to determine whether the alleged damage may have been caused by publicity of *true* facts (*e.g.*, contents of the FTC Report), opinion (*e.g.*, criticism of the cigarette industry in general), or even publicity already in circulation. *Id.* at 773.

11 (emphasis in original). The argument does not explain exactly how this “express” or “common-law” malice was shown, but the decision of the District Court makes it clear that in this case “express malice” was nothing more than another label for “actual malice”:

“[t]he making of a false accusation, knowing it to be false, could hardly be regarded as otherwise than malicious.” A reasonable jury could have concluded that defendants acted with express malice.

App. 122a (citation omitted). This circular logic hardly establishes that “*both* actual and express malice” were shown; it demonstrates only the extraordinary extent to which the court’s mechanistic finding of actual malice was allowed to predetermine every remaining issue in the case.

Any doubt as to the basis of the punitive damage award was resolved by the Court of Appeals, which held simply that “[p]unitive damages are available under Illinois law when a plaintiff has proven actual malice” (App. 47a), without any discussion of express or common-law malice.

IV. BROWN & WILLIAMSON’S CHARACTERIZATION OF THE FACTS

As noted at the outset, the uncontrolled rhetoric of B&W’s attack on petitioners is irrelevant to the question of whether certiorari should be granted in this case. At the same time, petitioners recognize that the Court may well consider the underlying merits and equities of a case in deciding whether review is justified. If these considerations are colored in any way by misapprehension of the facts, B&W’s rhetoric may be anything but harmless. Two examples are adequate to demonstrate the caution with which similar conclusory allegations in B&W’s brief should be approached.⁶

⁶ Other examples, including B&W’s treatment of the destruction of Radutzky’s notes, are discussed at pp. 22-25 of the petition.

A. "Pot, Wine, Beer and Sex" Ads

Throughout its Brief, B&W persists in characterizing the broadcast as a direct accusation that B&W was actually running advertising that featured marijuana, alcohol, and sex-related themes:

[P]etitioners falsely announced . . . that respondent [B&W] was running an immoral advertising campaign using "pot, wine, beer and sex". . . .

Br. in Opp. 2. *See also* pages 5, 6, 11 n.2, 21. B&W's arguments in support of actual malice rely almost entirely on blind acceptance of these characterizations as fact. *See* Br. in Opp. 21-22. It is therefore critical that the Court review the actual transcript of the entire broadcast (App. 129a-131a) and the relevant excerpt of the FTC Report (App. 134a-137a) to let the evidence speak for itself. The Court will find that the accusation described by B&W simply does not appear. It is not a logical reading in the context of the broadcast as a whole,⁷ and it is not, under any interpretation, the clear and intentional accusation that B&W would have the Court believe.

B. B&W's "Unequivocal" Denial

B&W claims that petitioners *conceded* they were told unequivocally "that the company had immediately re-

⁷ The broadcast presents three clear themes. It begins with a visual catalog of marketing techniques used by Marlboro, Benson & Hedges, and other manufacturers to attract the attention of young people to their products and brand names. This is followed by the second section or transition describing the cigarette industry's denials that it is intentionally appealing to children. The third section presents the FTC Report description of the "Viceroy strategy" to refute the industry's denials and to support Jacobson's premise and opinion that techniques like the ones shown at the beginning of the broadcast were part of a conscious appeal to young people. What was important to this premise was the FTC's disclosure of a specific strategy that was blatant in its description of how to manipulate the desires and insecurities of young potential smokers.

jected the consultant's suggestion, never published or commissioned any ads based upon it, and fired the advertising agency." Br. in Opp. 7. Petitioners have conceded nothing of the sort. B&W's denial was anything but "unequivocal," hedged with phrases that B&W had "*thus far* been unable to find copies," and that "*to the best of our knowledge* no ads as described by the memo were ever actually published." Pl's. Ex. 10. In all likelihood, B&W realized that closer examination would refute the kind of unequivocal denial now asserted in its brief.

B&W documents and evidence at trial⁸ established that B&W did not "immediately reject" the MARC strategy, but abandoned it only after fourteen months of intensive research and actual test market advertising failed to show any appreciable Viceroy market increase. Although B&W may have rejected the "ridiculous" idea of blatantly showing "pot, wine, beer and sex" in its advertising, it most certainly did not reject the basic MARC strategy of appealing to young "starters" by emphasizing a "free and easy, hedonistic lifestyle" in settings that would appeal to "the vast majority of young people" (App. 137a). The advertising agency was finally fired from the Viceroy account (but retained for B&W's Kool advertising) after its efforts to implement the strategy proved unsuccessful,⁹ twenty-one months after B&W received the initial MARC report.

⁸ This evidence is reflected in Defendants' Exhibits 60, 61 and Proposed Exhibit 57, excluded by the District Court. See n.9, *infra*.

⁹ Proposed Exhibit 57, the final report by MARC on its market research that demonstrated the direct link between the initial MARC proposal and the advertising eventually run in the test markets, was excluded by the District Court. Ironically, one of the reasons given was that some of the ads "might under some circumstances be regarded as rather lurid." Tr. 439. B&W was thus able to argue with impunity, and continues to argue, that the test market ads had nothing to do with the initial MARC strategy. (Br. in Opp. 7.)

CONCLUSION

B&W's Brief in Opposition is a compelling example of one reason why this case has reached this Court. From the very beginning both jurors and judges have been overwhelmed with appeals to the emotions¹⁰ at the expense of the facts. The broadcast has been portrayed as something it was not and interpreted in a manner that virtually guaranteed the finding of actual malice and the imposition of damages. As a result, what began as an example of "vehement, caustic, and unpleasantly sharp" criticism of the cigarette industry, in the classic tradition of the First Amendment, has reached this Court as a multi-million dollar judgment against the critic and the broadcaster. The need for a writ of certiorari and independent review by this Court could hardly be greater.

Respectfully submitted,

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¹⁰ As Justice Douglas suggested in his dissent in *Gertz*, 418 U.S. at 359, the influence of emotion and prejudice is not confined to the jury. See also Van Alstyne, *First Amendment Limitations on Recovery From the Press*, 25 Wm. & Mary L. Rev. 793, 801, 808 (1984) (excessive libel awards may reflect in part "localized judicial distaste for certain publishers" and the judges' "understandable, but constitutionally improper, distaste for the defendant's publication."). In this regard, it cannot be denied that Walter Jacobson is a controversial figure in Chicago. His style and commentary are definitely capable of angering not only viewers (see App. 3a), but jurors and judges as well.